IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH NAGPUR

Second Appeal No.179/2005

Office Notes, Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders. : Court's or Judge's orders

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CORAM : A.P. Lavande, J.
Dated : December 20, 2006

Heard Mr. J.J. Chandurkar, Advocate for the appellant and Mr. Saboo, Advocate for the respondent.

By this appeal, the appellant assails the judgment and decree dated 3.12.2004 passed by Additional District Judge, Khamgaon in Regular Civil Appeal No.15/2002 allowing the appeal filed by the respondent against judgment and decree dated 17.1.2002 passed by Civil Judge, Senior Division, Khamgaon in Hindu Marriage Petition NO.65/1995.

The appellant filed the above petition under Section 13 of the Hindu Marriage Act against respondent seeking divorce on the ground of cruelty and desertion. The petition was contested by the respondent. The trial Court, upon appreciation of the evidence led by the parties, held that the petitioner had not proved cruelty but had proved desertion by the respondent for more than two years and consequently granted the decree of divorce. The lower appellate court in appeal preferred by the respondent held that

the petitioner had not proved desertion and consequently dismissed the petition.

The petitioner and the respondent got married on 31st January 1982 and out of wedlock a daughter was born on 6.4.1984. Prior to birth of the daughter, the respondent left for her parental house for delivery. Since the wife did not return, in the year 1986 the petitioner filed the suit for restitution of conjugal rights which was withdrawn in the year 1993 and thereafter the suit was filed in the year 1995 seeking divorce. The trial Court upon appreciation of the evidence held that after leaving the matrimonial house in the year 1984 she had not made any efforts for resumption of cohabitation and since 1985 she had joined the Government service at Mangrulpir and the petitioner had shifted to Shegaon in the year 1984 itself. According to the trial Court, the respondent was requesting the petitioner to return to Akola and cohabit with him and she was not ready to cohabit with the petitioner at Shegaon. The trial Court also relied upon the fact that the respondent had filed complaint under Section 494 of the Indian Penal Code and the suit for damages against the petitioner which clearly established desertion on her part. The lower appellate Court on the contrary held that after shifting from Akola to Shegaon the petitioner had contracted second marriage with one Shobha who delivered three children

out of the second wedlock and upon coming to know of contracting of second marriage by the petitioner with Shobha, the respondent filed complaint against him under Section 494 of the Indian Penal Code in the Court of Judicial Magistrate First Class, Shegaon. The lower appellate Court also placed reliance upon voters' list and birth certificate which disclosed that Ambadas was residing in house no. 64 K along with his wife Suman. The birth certificate (Ex.32) also proved the birth of male child on 17.7.1992 since the name of the father of the child was mentioned as Ambadas Sukale - the appellant. The lower appellate Court also relied upon the circumstance that the petitioner had published a public notice in local newspaper in the year 1985 making certain allegations against the respondent. Considering all these circumstances the lower appellate Court held that it was not established that the respondent had deserted the petitioner for continuous period of two years before filing of the petition and the respondent was justified in staying at her parental house.

Mr. Chandurkar, learned counsel for the appellant submitted that the finding given by the lower appellate court that the desertion was not proved by the petitioner and that the respondent was justified in staying at her parental house is contrary to the evidence on record. According to Mr. Chandurkar, the

petitioner had established continuous desertion for more than two years by the respondent and hence the lower appellate Court was not justified in reversing the decree passed by the trial Court.

Per contra, Mr. Saboo, learned counsel appearing on behalf of the respondent supported the findings given by the lower appellate Court and submitted that no case is made out for interference in second appeal.

Having considered the submissions made by learned counsel for the parties and having perused the judgments passed by both the Courts below, I find no merit in the present appeal. The finding of lower appellate Court that the petitioner had not proved continuous desertion for more than two years prior to filing of the petition cannot be said to be perverse having regard to the evidence, oral and documentary, produced by the parties. The evidence on record clearly establishes that the petitioner had married Shobha with whom he was staying at Shegaon and further that Shobha had delivered three children from co-habitation with the petitioner. This finding, in my opinion, is borne out of oral and documentary evidence and cannot be said to be perverse. Once this finding is upheld, in my opinion, the lower appellate Court was justified in recording the finding that the petitioner had not proved desertion, since the respondent was justified

in not cohabiting with the petitioner and continuing to stay with her parents. It appears that the petitioner having contracted second marriage with Shobha and Shobha having given birth to three children after the said marriage any how wanted to get rid of the respondent by getting divorce. Granting of relief in favour of the petitioner would amount to granting premium upon the conduct of the petitioner in entering into second marriage during subsistence of the valid marriage between petitioner and the respondent, which would result in miscarriage of justice. I find no perversity in the findings recorded by the lower appellate Court and, in my opinion, lower appellate court was justified in reversing the decree passed by the trial Court. In any event, no substantial question of law is involved in the present appeal. Hence, the appeal is summarily rejected.

JUDGE

A.